No. 4132

In the United States Circuit Court of Appeals

For the Ninth Circuit

MASENORI TANAKA,

Appellant,

—VS.—

LUTHER WEEDIN, Commissioner of Immigration

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE FRANK S. DIETRICH, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF FACTS

The Appellant, MASENORI TANAKA, a Japanese alien employed as a seaman on the Japanese steamship "Africa Maru", deserted from the said vessel while she lay at the Port of Tacoma on January 13, 1919. He had formed the intention of deserting before he left the vessel, as is evidenced by the following questions and answers at

his hearing before the Immigration Inspector, which is part of the record on this appeal:

> "Q. What led you finally to desert the ship?
> A. I just made up my mind a few minutes before I deserted."

He had at the time of said entry into the United States no passport from his Government entitling him to enter the United States. After his desertion he secured employment in the sawmill at Fairfax, Washington, where he was employed until April, 1923, or for a period of more than four years after his unlawful entry into the United States.

In April, 1923, he was arrested and after a hearing before the Immigration Inspector, the Inspector found the appellant was, at the time of entry, a person likely to become a public charge, and that he entered in violation of rule 11 of the immigration rules, and recommended deportation. An appeal was taken to the Secretary of Labor, who affirmed the findings of the Immigration Inspector and caused a warrant of deportation to issue. An application for a writ of Habeas Corpus was then made, which writ was denied. From the order denying the issuance of the writ this appeal is taken.

Rule 11, above referred to, is as follows:

"Subdivision I. *President's proclamation.* —The President's proclamation on this subject, issued February 24, 1913, reads as follows:

Whereas by the act entitled "An act to regulate the immigration of aliens into the United States," approved February 20, 1907, whenever the President is satisfied that passports issued by any foreign Government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or from such insular possession or from the Canal Zone;

And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, I am satisfied that passports issued by certain foreign Governments to their citizens or subjects who are laborers, skilled or unskilled, to proceed to countries or places other than the continental territory of the United States are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

I hereby order that such alien laborers, skilled or unskilled, be refused permission to enter the continental territory of the United States.

It is further ordered that the Secretary of Commerce and Labor be, and he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect.

Subdivision 2, *Effect of proclamation.*—The proclamation requires that laborers, skilled or unskilled, who are citizens of a country which grants to its laborers proceeding abroad limited labor passports only, and who present at a continental port a passport entitling them only to admission to countries or places other than continental United States, shall be rejected. It does not in any particular relieve such aliens from examination under the general provisions of the law.

Subd. 3. *Rejection or admission as affected by passport.*—If such a laborer applies for admission and presents no passport, it shall be presumed (1) that when he departed from his own country he did not possess a passport entitling him to come to the continental territory of the United States, and (2) that at that time he did possess a passport limited to some country or place other than continental United States. If he presents a passport entitling him to enter continental United States or not lim-

ited to some country or place other than continental United States, he shall be admitted, unless he belongs to one of the classes excluded by the general provisions of the law. If he presents such a limited passport, but claims that he is not a laborer, skilled or unskilled, proof of such claim shall be required.

Subd. 4. *Right of appeal, etc.*—All laborers excluded under this rule shall be advised not only of their right of appeal where one lies, but also that they may communicate by telegraph or otherwise with any diplomatic or consular officer of their Government, and they shall be afforded opportunity for doing so.

Subd. 5. *Definition of term laborer.*—For practical administrative purposes the term "laborer, skilled and unskilled," within the meaning of the Executive order of February 24, 1913, shall be taken to refer primarily to persons whose work is essentially physical, or, at least, manual, as farm laborers, street laborers, factory hands, contractors' men, stablemen, freight handlers, stevedores, miners, and the like; and to persons whose work is less physical, but still manual, and who may be highly skilled, as carpenters, stonemasons, tile setters, painters, blacksmiths, mechanics, tailors, printers, and the like; but shall not be taken to refer to persons whose work is neither distinctly manual nor mechanical, but rather professional, artistic, mercantile, or clerical, as pharmacists, draftsmen, photographers, de-

signers, salesmen, bookkeepers, stenographers, copyists, and the like.

Subd. 6. (Not material).

There had been issued for, but not to, the appellant, an alien seaman's identification card, issued under rule 10 of Immigration Rules, which was introduced as evidence before the Immigration Inspector, and is part of the record on appeal. These cards are never turned over to the seamen but remain in the possession of the captain of the vessel, as in this case, and are for identification purposes in checking the crew on the entry and departure of the vessel, and are not an authority to land, even on the face of the card, except in "pursuit of his calling." Section 32 of the Immigration Act of February 5, 1917, provides that no alien excluded from admission into the United States by any law, convention or treaty of the United States, regulating immigration of aliens and employed on board any vessel arriving in the United States from any foreign port or place, shall not be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor, providing for the ultimate removal or deportation of such alien from the United States.

There had also been issued to the appellant by the Japanese Government a "Seaman's Book." Kaiin Techo, which, according to the testimony of Horiso Saito, the Japanese Consul at Seattle, is issued to every applicant for position as seaman in Japan, and is a Government document only in the sense that it is issued by the Government, and is not a passport in the ordinary sense of the word, and is a document to identify the holder as a subject of Japan, and as a seaman, and to set forth certain facts concerning his past history, and is not intended as a passport to permit the holder to travel to any port or country. (Page 11 of the Immigration Record, which is part of the record on this appeal).

The appellant, himself, testified that he had no passport; that his seaman's book so-called, was surrendered to the master of each vessel on which he worked, and was returned to him when he left that vessel; that said book was in the possession of the captain of the "Africa Maru" at the time of his desertion. (Page 5 and page 12 of the Immigration Record, which is part of the record on this appeal). This seaman's book, or Kaiin Techo, was not offered in evidence.

ASSIGNMENTS OF ERROR

The appellant waives all assignments of error, and states that only one question is raised, viz., was appellant entitled to his discharge or should he be deported.

ARGUMENT

In determining what appellant says is the only question involved, to-wit: is Masenori Tanaka entitled to his charge or should he be deported, this court must, at the outset, ask the question, "Was the appellant denied a fair and impartial hearing before the Immigration Inspector?" It is nowhere in the brief contended that the hearing was not fair and impartial. If the hearing was fair and impartial, the court is without jurisdiction to consider this appeal.

> *Chin Yow v. United States*, 208 U. S. 11;
> *Low Wah Suey v. Backus*, 225 U. S. 460;
> *Wallis v. United States*, 273 Fed. 509.

Passing to a consideration of the argument of appellant, we find on analysis that it falls under three heads or divisions, though not so expressly stated in the brief. Appellant argues as follows:

> I. The case of *Ono v. United States*, 267 Fed. 359, can be distinguished from the case at bar.

II. Section 34 of the Immigration Act of February 5, 1917, creates a three year limitation period for the deportation of alien seamen and appellant is an alien seaman who has been in the United States for more than three years and hence can not be deported.

III. The appellant having no passport at all, Immigration Rule 11 does not apply.

Taking up a consideration of these arguments in their order we find that this case is identical with the case of *Akiro Ono v. United States*, decided by this court on September 7, 1920, and reported in 267 Fed. 359. Ono was a Japanese alien employed as a coal passer on board a vessel from which he deserted at Galveston, Texas, on March 1, 1915, and thereafter remained in the United States, employed as a laborer. At the time of his arrest five years had not elapsed, but more than three years had, since his entry into this country. It was held he was an unskilled laborer and denied the right of entry into the United States, by virtue of the Act of February 20, 1907, and the Presidential proclamations promulgated thereunder and pursuant thereto, and subject, by the provisions of section 19 of the Act of February 5, 1917, to deportation, within five years of his entry.

Appellant seeks to distinguish the *Ono* case on

the ground that the appellant was a seaman, but so was Ono. It appears that Ono was a coal passer and it appears that the appellant was a watchman (page 7, Immigration Record, which is part of the record on this appeal), but both were seamen until they abandoned their calling or occupation for under the terms of the Immigration Act itself (Section One of the Act of February 5, 1917), the term "seaman" as used in the Act shall "include every person signing on the ships articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place."

Appellant argues that he had a passport, and therefore, this case may be distinguished from the *Ono* case, but it clearly appears from the testimony of the appellant, and from that of the Japanese Consul, that he had no passport, and that the so-called seaman's book, or Kaiin Techo, was not a passport, and was not intended as such.

Appellant further contends that the fact that an alien seaman's identification card had been issued by the immigration authorities, distinguishes this case from the *Ono* case. It does not appear whether such a card was issued in the *Ono* case or not; in any event it is immaterial. The card was never

issued to the appellant, but was kept by the captain, as appears from appellant's own testimony (pages 6 and 7 of the Immigration Record, which is part of the record on this appeal). And it appears from Inspector Gowen's statements, in response to questions of appellant's counsel, that these cards are used for checking "out and in" to enable the authorities to detect stowaways or deserters, and the notations of arrivals on the card indicate merely that the individual named on the card was a member of the crew, and not that they were allowed to go ashore (pages 7 and 8 of the Immigration Record, which is part of the record on this appeal). The card itself grants permission to the person named therein to land only in "pursuit of his calling." The appellant had abandoned his calling at the time he landed. He landed with the previously formed intention of deserting his ship and calling, and did so. Similar cards are issued for all seamen, of whatever nationality, but under the express provisions of Section 32 of the Immigration Act of February 5, 1917, referred to supra, the appellant was not entitled to land at all.

Clearly, this case cannot be distinguished from the *Ono* case and the decision in the *Ono* case is de-

terminative of the questions raised in the present case.

* * * *

We come now to a consideration of appellant's second argument; namely that deportation proceedings are barred because not brought within three years. Appellant directs the Court's attention to Section 34 of the Immigration Act of February 5, 1917, providing that if an alien seamen shall land in a port of the United States contrary to the provisions of the act he shall be deemed to be unlawfully within the United States, and shall at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifactions for admission to the United States, and if not admitted "SAID ALIEN SEAMAN SHALL BE DEPORTED."

It is conceded that appellant has been in the United States for more than three years, but less than five. It is an alien seaman, and not a *former* alien seaman, to whom the said section applies.

Sections 31 to 36 inclusive of the Immigration Act of February 5, 1917, deal with seamen and the crews of vessels and the limitation in Section 34

clearly refers to the provisions relative to the landing of alien seamen set forth in Sections 31, 32 and 33 of the said Act, and would not apply if the alien seaman had landed in violation of some other provision of the Act. Thus Section 19 provides that any alien who, after being excluded and deported or arrested and deported as a—procurer, or as having been connected with the business of prostitution or importation for prostitution—shall return to and enter the United States—he shall be liable to deportation at any time, there being no five or three year period in such a case. It would not be contended that an alien, coming within the classifaction referred to, on a showing that he was a *bona fide* seaman, could defeat deportation unless the proceedings were instituted within three years of his return and entry into the United States. The inspector found that the appellant had entered the United States in violation of Rule 11. Rule 11 is a suitable rule and regulation for carrying out the provisions of the sixth proviso of Section 3 of the Act of February 5, 1917, which is identical with the last proviso of Section 1 of the Act of February 20, 1907, which is still in effect. *Ono v. United States, supra.* By the express provision of Section 19 of the Act of February 5, 1917, the appellant

was subject to deportation at any time within five years from the time of his entry. *Ono v. United States, supra.* Therefore the limitation period referred to in Section 34 has no application.

But in any event said Section 34 can have no application to this case for the reason that appellant was not a seaman at the time of his entry into the United States; he was not a seaman at the time of his arrest and hearing or at any intervening time. To contend that the appellant was a seaman during the four years he worked in the lumber camp at Fairfax, Washington, is ridiculous. It does not even appear that he was a timber cruiser. As a matter of fact it appears from his own testimony that he formed the intent to desert his ship and his calling before he landed from the S. S. *Africa Maru* at Tacoma on January 13, 1919. It is true as contended by appellant that a seaman is not a laborer within the purview of the Immigration acts; but when a seaman ceases to be a seaman he is no longer entitled to the rights, privileges and immunities of a seaman. The fact that he was at one time a seaman does not follow him as a protecting cloak no matter what subsequent vocation he may adopt. The whole matter is well stated by

Judge Chatfield in *United States v. Crouch*, 185 Fed. 907:

> "The word 'seaman' as used in the statute refers to an occupation. That occupation is recognized by the laws and the cases as continuous, and as covering the future, unless it is terminated by something contradictory to a continuation of the professional calling which the word implies. * * * It would seem that the application of the statute should depend upon the purpose for which the landing was made, and that the change from the status of a seaman into that of an immigrant occurs when a person attempts to get into the United States as an immigrant, for the sake of remaining as a resident, and that he should be judged under the immigration laws according to that standard, rather than according to what he had been before he changed his status by forming the new intent."

It has been uniformly held that even under the "Chinese Exclusion" acts, directed against Chinese laborers, seamen were not excluded, so long as they remained members of the crew; but as soon as they ceased to be seamen they became amenable to the Exclusion Acts.

In Re Moncan, 14 Fed. 44;
In Re Ah Kee, 22 Fed. 519.

The reasoning in the *Moncan* and *Ah Kee* cases

supra is clearly applicable here, and when appellant ceased to be a seaman, he became subject to the provisions of rule 11, *supra*, and it appears affirmatively in this case that before he left his ship he intended to desert, and he left the ship and landed with the intention of becoming a laborer and a resident in the United States, and to that extent this is a stronger case than the *Ono* case, *supra*.

Appellant's own authorities are in entire accord with the reasoning in the *Crouch*, *Moncan* and *Ah Kee* cases, *supra*. Appellant cites only six cases apart from the *Ono* case, which case he seeks to distinguish. These cases are:

Ellis v. United States, 206 U. S. 246;
United States v. Jamieson, 185 Fed. 165;
Taylor v. United States, 207 U. S. 120;
United States v. Sandrey, 48 Fed. 550;
United States v. Burke, 99 Fed. 895;
United States v. Atlantic Transport Company, 188 Fed. 42.

Not a single one of these cases is a *habeas corpus* case. Not one of them involves any question of the status of an alien, as between the Government of the United States and the alien. They were all, except in *Ellis v. United States*, *supra*, cases where the Government was seeking to hold parties for

penalties or head taxes for allowing certain aliens to enter the United States. This is not an action against the captain of the S.S. "Africa Maru", but a case between the alien and the Government, and it is obvious that the situation between the Government and the alien, a deserting seaman, and the situation between the Government and the captain or master of a vessel who regarded the alien as a bona fide seaman is entirely different.

In the Ellis case supra, it was held that seamen were not laborers or mechanics within the meaning of an Act prohibiting the working of laborers or mechanics more than eight hours a day on public works and casts no light on the question involved in this case.

In the Jamieson case supra, Judge Hand held that a master was not liable to a penalty for bringing a Chinese person into the United States where a Chinese seaman had been permitted to go ashore for temporary purposes while his vessel was in port. But note this language in his decision:

> "Of course I do not mean that the entry of a laborer under the guise of a seaman would not exclude him, or that his permanent severance from any ship would not change his character. I am assuming the case of a bona fide seaman, the member of a crew."

In the Taylor case supra, it was held that the master of a vessel could not be convicted on a charge of landing or permitting an alien to land at any time or place other than that designated by the Immigration officers, where a sailor deserted on shore leave, there being no showing of bad faith on the part of the master.

In the Sandrey case supra, the captain of a vessel was held to be not liable for a penalty in the case of a deserting seaman where the statute provided for a penalty when the master knowingly or negligently landed, or permitted to land, an alien immigrant at any place or time other than that designated by the Immigration officers, it appearing in the case that the captain acted in good faith.

In the Burke case supra, it was held that the master was not liable for a penalty for failure to return upon his vessel an immigrant of a prohibited class, where the immigrant was a deserting seaman, and the captain had acted in good faith.

The Atlantic Transport Company case supra, strongly supports the Government's position in this case. It was held, as stated by appellant, that horsemen, signed for service on a vessel in caring for horses were seamen, but it also holds that the

company was liable for a head tax under Section One of the Act of February 20, 1907, requiring the payment of a head tax on every alien entering the United States, the reason being that these horsemen were signed only for the voyage over, that when the voyage ended they ceased to be seamen and became aliens who were subject to the head tax, whereas as seamen, they would not have been.

In the opinions of the Attorney General cited by the appellant, the rights of bona fide seamen, and not those of deserting seamen, are discussed.

We conclude, therefore, that Section 34 has no application to a violation of rule 11 or of any sections of the Act of February 5, 1917, other than those referring to the landing of alien seamen. But in any event, it has no application to the appellant, for appellant had formed the intention to desert his vessel and his calling as a seaman before he landed, and certainly he was not a seaman at the time of his arrest and hearing before the Inspector in this case.

* * * * * * * *

Appellant's final contention is that rule 11 and the last proviso of Section One of the Act of February 20, 1907, and the 6th proviso of Section 3 of the Act of February 5, 1917, do not reach the case

of an alien coming to the United States directly from Japan without a passport.

This issue was squarely raised in the Ono case supra, and was decided adversely to the appellant. Japanese without passports cannot lawfully enter the United States. If the appellant herein had applied to the Immigration officials at Tacoma, Washington, for admission to the United States on January 13, 1919, could he have been lawfully admitted to this country? Surely not. He was a laborer and a citizen of a country which grants to its laborers proceding abroad limited passports only. The record in this case indicates that the appellant had no passport at the time of his arrival in this country. Immigration Rule 11, promulgated pursuant to law and pursuant to the specific direction of the President's Proclamation of February 24, 1913, provides in subdivision 3 of said rule that

> "If such a laborer applies for admission and presents no passport, it shall be presumed (1) that when he departed from his own country he did not possess a passport entitling him to come to the continental territory of the United States, and (2) that at that time he did possess a passport limited to some other country or place other than continental United States."

It is clear, therefore, that appellant herein should

have been, and would have been, excluded, had he applied to the Immigration officers for admission at Tacoma, on January 13, 1919, he being "a member of one or more of the classes *excluded by law*." His exclusion was just as mandatory is it would have been had he been afflicted "with a dangerous contagious disease," or as if he had been a polygamist or an anarchist.

Section 23 of the Immigration Act of February 5, 1917, authorized the Commissioner-General of Immigration to establish such rules and regulations, and to issue from time to time such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of the Immigration Act. Under and by virtue of that authority Rule 11 was promulgated. The construction given to the statute by officials charged with its administration will be upheld by the court unless convincing reason to the contrary is found in the language or purpose of the enactment.

> *Illinois Surety Co. v. United States*, 215 Fed. 334.

We must, therefore, conclude that Rule 11 is applicable to the present case, and that the appellant was properly ordered to be deported.

We have considered and disposed of all of the

arguments advanced by appellant, and attention is again directed to the fact that there can be no question but that the appellant had a fair hearing, and that there is ample evidence in the record to support the Inspector's findings as to the facts. It is respectfully submitted, therefore, that the law authorizes the appellant's deportation, and it is respectfully requested that the appeal be dismissed and the order of the District Court denying the Writ requested, be affirmed.

Respectfully submitted,

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